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IN THE

Supreme Court of the United States

October Term, 1941

No. 573

314-661

JAMES W. MURPHY, DOING BUSINESS AS LAFRANCE TOLEDO COMPANY,
Petitioner,

vs.

JAMES A. BRADY, ACTING COLLECTOR OF INTERNAL REVENUE FOR OHIO (TENTH DISTRICT),
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

WILLIAM O. BALLARD,
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Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DATES OF DECREES; OPINIONS BELOW; REHEARING

Petitioner respectfully seeks a writ of *certiorari* from this court to the United States Circuit Court of Appeals for the Sixth Circuit, to review an order of that court entered May 6, 1941 (R. 45), against petitioner (appellant there), affirming a decree entered against him November 22, 1939 (R. 36), by the District Court of the

United States for the Northern District of Ohio, Western Division, at Toledo, dismissing petitioner's bill of complaint (R. 1) and dissolving preliminary injunction (R. 19-21) on motions therefor (R. 25-26) of respondent, defendant in the District Court.

No opinion was entered or filed in either of said lower courts aside from the orders, judgments and decrees entered of record as above set forth. Neither one is reported.

On the entry of the order in the United States Circuit Court of Appeals (R. 45) petitioner timely filed, namely, on June 2, 1941, his petition for a rehearing (R. 47) within the thirty days after the entry of the order in that court and otherwise as required by Rule 28 of that court.

Thereafter the Court of Appeals entertained the petition for a rehearing, and on June 5, 1941, by order duly entered on its records, denied petitioner's petition for a rehearing (R. 53).

Transcripts of the record are filed herewith as required by this court's Rule 38.

A

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

1. Summary

The matter involved here includes primarily:

(a) Interpretation and construction of Section 603 of Internal Revenue Act of 1932, 47 Stat. 169, determining whether a caustic chemical article, Tri-Sodium-Phos-

phate, a water softener, purchased by petitioner in bulk from the manufacturer thereof in St. Louis, Missouri, and then slightly perfumed by petitioner for sales appeal only, and then packaged by petitioner in cartons and distributed, sold, by him to the consumer, under petitioner's trade name, "NU-WITE," can legally be taxed under Section 603, petitioner claiming such perfumed article is not covered by that section, that is, it is not any one of the articles specifically named in the section, nor is it any substance, article or preparation similar to any one of those articles, and that therefore it can not be taxed under the section, a verbatim copy of which section reads as follows:

> "There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5 per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substances, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes."

(b) Determining whether petitioner is a manufacturer, producer or importer of the article he sells as aforesaid, petitioner claiming he can not be classed as being any one of them and that therefore for this additional reason the article he sells can not be taxed under Section 603.

(c) *Declaratory Judgment*:

Neither petitioner nor his counsel at any time contemplated or intended asking for a declaratory judgment in this action in the sense of the Federal Declaratory Judgment Statute, Act of June 14, 1934, 48 Stat. 955, Judicial Code Section 274D, 28 U. S. C. A., Section 400, which reads as follows:

> "(1) In cases of actual controversy (except with respect to federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
>
> (2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
>
> (3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

The intention was and is only to obtain a final judgment for refund of a tax paid under protest and a final injunctive decree against collection of a tax demanded and assessed, but not paid, all as shown by paragraphs

D, E, F and G of the prayer (R. 7-8). We regret the inclusion of paragraphs B and C in the prayer (R. 7). They were superfluous and probably misled the Court of Appeals as to the intention and desire of the petitioner.

(d) Determining whether the Court of Appeals erred in affirming the District Court in its final judgment and decree dismissing petitioner's bill of complaint (R. 1-14, 29-30) without trial on the merits on complaint, answer and evidence, and thereby denying to petitioner final decree of injunctive relief prayed for, preventing respondent from collecting from petitioner by distraint on his property or otherwise a tax on perfumed Tri-Sodium-Phosphate, not paid, in the sum of $4924.27, plus a penalty, $1231.07, plus interest of $654.93, total $6810.27, demanded and assessed under Section 603 by respondent from and against petitioner prior to the filing of his bill of complaint; and thereby also denying to petitioner a judgment prayed for against respondent for a refund of the sum of $998.22, paid to respondent by petitioner under protest as a tax under Section 603 on Tri-Sodium-Phosphate, perfumed as aforesaid and sold by petitioner during the period of January 1 to June 30, 1937; petitioner claiming he is entitled to a judgment for such refund because the article he sells is not covered by Section 603 and that because of extraordinary and exceptional circumstances shown in the record as now made, and as it would be made on the complaint, answer and evidence, he is entitled to proceed by bill in equity for and to have relief as prayed for through final decree enjoining respondent from collecting the tax, penalty and interest, demanded and assessed as aforesaid, but not paid, notwithstanding Section 3224 of the Revised Stat-

utes (Title 26, U. S. C. A. 1543), a verbatim copy of which section is as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

(e) *Pleadings and Other Proceedings*:

1. Petitioner's complaint was filed in the District Court November 8, 1937 (R. 1), and at that time, aside from the prayer, he made oral application for temporary restraining order and preliminary injunction. At suggestion of the court and on consent of parties the matter was set for hearing on November 13, 1937, for preliminary injunction.

2. Such hearing was had on that day on the verified bill of complaint and exhibits thereof (R. 1-14), the affidavit of petitioner (R. 15-16) and its Exhibit E (R. 17-18) filed in Department of United States Commissioner of Internal Revenue and sent to petitioner August 9, 1937, motion of respondent filed November 12, 1937, to dismiss the complaint (R. 23-24) and argument by counsel for the parties.

3. The hearing being completed November 13, 1937, preliminary injunction was granted that day (R. 19) and preliminary injunction order was filed November 16, 1937 (R. 21-23), including approval of bond tendered and filed that day (R. 19-20).

4. November 27, 1937, respondent was given leave until December 22, 1937, to answer the complaint (R. 24), but instead thereof on December 6, 1937, he filed motion to dissolve the preliminary injunction and an amended motion to dismiss the complaint (R. 25-27).

5. March 26, 1938, petitioner by consent of parties

filed a supplement to his bill of complaint (R. 29-30) showing that on December 1, 1937, after filing of the complaint on November 8 of that year, the Commissioner of Internal Revenue denied petitioner's demand, filed with him prior to filing the compaint, for refund of the tax paid under protest, and likewise on December 1, 1937, the Commissioner rejected and denied petitioner's demand, made before filing his complaint, for abatement of the tax, penalty and interest assessed but not paid.

At this stage of the proceedings counsel for the respective parties filed their respective briefs on the questions involved with the court.

6. March 20, 1939, notice of ruling by the court was filed sustaining the motion to dissolve temporary injunction and sustaining the amended motion to dismiss the complaint (R. 31).

7. April 6, 1939, petitioner filed his motion with briefs in support thereof for a rehearing and further consideration of the cause (R. 31).

8. On or shortly prior to October 16, 1939, counsel for respondent served on counsel for petitioner copies of proposed findings of fact and conclusions of law. Counsel for petitioner understanding that such proposed findings and conclusions had been filed of record in the case for approval by the court, filed on October 16, 1939, petitioner's objections to the same (R. 34), and with such objections renewed and filed petitioner's motion for rehearing (R. 34). The proposed findings and conclusions were not filed in the clerk's office as understood by petitioner's counsel, but were filed with the judge who filed them for record on November 22, 1939 (R. 32), and on that day filed orders respectively overruling petitioner's

objections to the findings and conclusions and his motion for rehearing (R. 35).

9. Also on November 22, 1939, the court filed final judgment and decree dismissing the bill of complaint at plaintiff's costs and dissolving the preliminary injunction (R. 36).

10. Thus, on November 22, 1939, the District Court, on the complaint and its exhibits (R. 1-14), petitioner's affidavit (R. 15) and its Exhibit E (R. 17), petitioner's supplement to the complaint (R. 29-30), respondent's motion to dissolve the preliminary injunction (R. 25), and his amended motion to dismiss the complaint (R. 26-27), and briefs of counsel for the respective parties, denied petitioner's motion for a rehearing, overruled his objections to the findings of fact and conclusions of law (R. 35) and entered final judgment and decree (R. 36) dismissing the complaint at petitioner's costs and dissolving the preliminary injunction on expressed grounds that the complaint is without equity and that the court had no jurisdiction thereof because of the provisions of Section 3224, Revised Statutes (U. S. C. A., Title 26, Section 1543).

11. January 3, 1940, petitioner gave notice of appeal (R. 37) to the Circuit Court of Appeals for the Sixth Circuit, including tender of continuance of the bond theretofore given (R. 19) on preliminary injunction in the sum of $2000.00.

12. On February 1, 1940, respondent filed motion (R. 38) asking for an order that petitioner file supersedeas bond in the sum of $8703.26 ("judgment" so-called by the United States Attorney though no money judgment for taxes was entered).

13. The above motion was overruled February 13, 1940 (R. 39), and the $2000.00 bond (R. 19) was accepted by the court by its order of February 21, 1940 (R. 40).

2. Statement of Facts Involved

This suit was begun through the filing by petitioner of his complaint in the District Court November 8, 1937, and the facts involved are shown by that complaint and its Exhibits A, B, C and D (R. 1-14), his affidavit and its Exhibit E filed November 13, 1937 (R. 15-18), and his supplement to the complaint filed March 26, 1938 (R. 29-30).

Aside from preliminary allegations showing citizenship and residence of the parties, the official capacity of the defendant at the time, Graves, as Internal Revenue Collector for the Tenth District of Ohio, at Toledo, the nature of the suit, the enactment of the federal statute, said Section 603 quoted above, under which the suit arises, and giving a verbatim copy of that section (R. 1-2), the complaint in effect alleges:

(a) That petitioner then was and for about four years had been doing business in Toledo, Ohio, selling a general purpose water softener and cleaner under his registered trade name, "NU-WITE" (R. 1-3); that this water softener is Tri-Sodium-Phosphate, a white crystalline caustic chemical quickly soluble in water, which chemical petitioner purchases in bulk, large lots, from the manufacturer thereof, Mansanto Chemical Company, of St. Louis, Missouri, and which is primarily adapted, advertised and sold for all general cleaning purposes for the home, factory, hospital, bakery, creamery, farm, and other institutions, all as shown by copy of pamphlet

issued by said manufacturer, petitioner's source of supply, attached to the complaint as Exhibit B (R. 3, 10); and

(b) That petitioner sells NU-WITE in packages, cartons, copy attached to complaint as Exhibit A (R. 3, 9), and in bulk, the packaged portion being sold primarily to homes, the bulk portions to hospitals, factories and other institutions referred to above; that to a portion of the packaged product perfume is added in a minute quantity for initial sales appeal only, which in no instance changes the character of or enhances the cleaning or water softening qualities of the product (R. 3, affidavit R. 15); that NU-WITE, perfumed or unperfumed, is not one of the articles enumerated in Section 603 in question of the Revenue Act of 1932, or any similar substance, article or preparation; that it imparts no odor to the user and is so caustic that it is not only unfit for use as a cosmetic, toilet powder, or any similar article, but is actually harmful in contact with the human skin (R. 3, 4, affidavit R. 15); and

(c) That petitioner was advised by the Commissioner of Internal Revenue of the Treasury Department of the United States Government under date of August 9, 1937 (R. 3 and Exhibit E, R. 17-18) that NU-WITE not perfumed, either in bulk or in packages, is not taxable under said Section 603; that petitioner says the mere addition of perfume as aforesaid to NU-WITE as initial sales appeal only, does in no manner change its character, uses, utility or effectiveness, or convert it into any article subject to the tax imposed by said Section 603; and

(d) That defendant, Graves, claimed that the per-

fumed NU-WITE was subject to the tax imposed by said Section 603, and in February, 1937, made demand upon petitioner to file returns for each calendar month on all sales of perfumed NU-WITE made since the effective date of said Revenue Act of 1932, June 21, 1932, and said defendant then made demand upon petitioner to pay the tax for all perfumed NU-WITE theretofore packaged and sold by petitioner since said effective date, plus penalties and interest, and said defendant assessed petitioner $4924.27 tax, plus $1231.07 penalty, plus $654.93 interest, or a total of $6810.27 (R. 3, 4); and

(e) That following said defendant's demands and assessment petitioner paid to said defendant in the months of April, May, June and July, 1937, a total of $998.22 under protest as a tax on perfumed NU-WITE for the period January 1, 1937, to June 30, 1937, but petitioner never included the tax or any part thereof in the sale price of NU-WITE and never collected the tax assessed or paid under protest, or any part thereof, from petitioner's vendees (R. 4, paragraph 9, and 5, paragraph 15); and

(f) That petitioner is not subject to any tax under said Section 603 because he is neither the manufacturer, producer nor importer of the product he sells, but that he purchases Tri-Sodium-Phosphate in bulk from the manufacturer and producer thereof and that petitioner is only a merchant packaging the product and reselling it at retail (R. 4); and

(g) That Tri-Sodium-Phosphate, unperfumed and perfumed, and sold by petitioner's competitors, having the identical properties and uses and prepared for sale in identical manner as the product petitioner sells, had

not been subjected to the claimed tax sought to be imposed on petitioner, and that no attempts were being made by the Department of Internal Revenue of the Federal Government to subject said Tri-Sodium-Phosphate sold by petitioner's competitors to said tax; and that such action in attempting to impose said tax upon the product sold by petitioner is discriminatory, arbitrary and capricious (R. 4); and

(h) That the business of packaging Tri-Sodium-Phosphate is a highly competitive one and petitioner cannot pay the claimed tax on NU-WITE hereafter sold and compete with others so packaging and selling Tri-Sodium-Phosphate under other trade names upon whom no attempt has been made or is being made to impose said tax (R. 5, paragraph 14);

(i) That petitioner on advise of his legal counsel had at all times sincerely believed and still so believes that the article, perfumed NU-WITE, packaged and sold by him as aforesaid, is not subject to any tax under said Section 603 of Revenue Act of 1932 (R. 3, 4, affidavit R. 15, 16);

(j) That if perfumed NU-WITE is taxable as claimed, then under Section 626 of Revenue Act of 1932 petitioner must make monthly reports under oath in duplicate and pay the tax to said Collector, which tax becomes due and payable on making the report, and this without any assessment or notice;

That failure to make such monthly report and to pay the tax, with interest and penalty, if any, will subject all of petitioner's property to lien, distraint and sale for the tax, interest and penalty on sales heretofore and hereafter made, and on such failure defendant, unless en-

joined, will resort to remedies provided by law to enforce such payment (R. 5);

(k) That the amount of said tax heretofore claimed, assessed and demanded as aforesaid and as hereinafter stated, is so large that petitioner could not and cannot pay the same; that to raise the money therefor would require petitioner to liquidate and sacrifice his assets in whole or in the greater part needed to transact his business; that enforcement by defendant through the methods provided by law of payment of the claimed and assessed tax not paid on sales heretofore made and hereafter to be made, will seriously cripple, if not completely destroy, petitioner's business and its valuable good-will, ruin petitioner financially and inflict on him a permanent and irreparable injury and loss, for which he has no remedy at law; and additionally, that loss of petitioner's business will throw many persons out of employment who are self-supporting through employment by petitioner (R. 5, paragraph 14);

(l) That on October 5, 1937, prior to filing of the complaint on November 8, 1937, petitioner filed with defendant claim for refund of said tax paid under protest in the sum of $998.22 (R. 6), copy of said claim being Exhibit C (R. 11);

(m) That on October 21, 1937, petitioner received notice and demand from the United States Treasury Department, Internal Revenue Service, on its Form 17, for payment of said tax of $4924.27, penalty of $1231.07, and interest of $654.93, assessed as aforesaid, a total of $6810.27, but not paid prior to January 1, 1937 (R. 6, paragraph 17);

(n) That on October 23, 1937, petitioner filed with

defendant a claim for abatement of the assessment last above mentioned (R. 6, copy of the claim being Exhibit D, R. 13);

(o) That petitioner's supplement (R. 29) to his complaint filed March 26, 1938, alleges,

(1) That on December 1, 1937, after the complaint was filed November 8, 1937, the United States Commissioner of Internal Revenue in writing communicated to petitioner an order holding that perfumed NU-WITE water softener or NU-WITE water softener sold in perfumed containers are preparations sales of which are subject to tax under the provisions of said Section 603, and that petitioner's claim for refund of the tax of $998.22 paid under protest covering the period of January 1, 1937, to June 30, 1937, including interest, was rejected in full; and that no part of the sum so paid has been refunded; and

(2) That on December 1, 1937, after the complaint was filed November 8, 1937, the Commissioner in writing communicated to petitioner an order holding that perfumed NU-WITE water softener or NU-WITE water softener sold in perfumed containers are preparations sales of which are subject to tax under the provisions of said Section 603, and that petitioner's claim for abatement of said tax assessed but not paid in the sum of $6810.27, including penalty and interest, was rejected in full; and that no part of said amount has been abated;

(p) The complaint as filed November 8, 1937, in its last paragraph 19 (R. 7) alleges in effect, that immediate and irreparable injury, loss and damage would result to petitioner before notice could be served and a hearing had thereon, unless a temporary restraining order

against defendant should be issued; that unless such order should be issued petitioner and his employees, on failure of immediate payment of the claimed tax, would be subject to heavy criminal and the other penalties provided by law; and that collection of the tax by summary process pending a hearing for temporary injunction would leave petitioner without adequate remedy at law or in equity.

B

STATEMENT DISCLOSING JURISDICTION

1. The final judgment and decree of the United States Circuit Court of Appeals for review of which *certiorari* is sought, was entered against petitioner May 6, 1941 (R. 45); petition for rehearing was filed June 2, 1941 (R. 47), within the thirty days prescribed by Rule 28 of that court, and was denied by that court's order entered June 5, 1941, at which latter date the decree became final and from which the three months' limitation for making application for *certiorari* began to run, and it expires September 5, 1941.

Section 8(a), Act of February 13, 1925, 43 Stat. 936.

This proceeding is timely filed under that Act and this court's Rule 38.

Bank vs. Opperman, 249 U. S. 448, 449; 63 L. Ed. 701.

Gypsy Oil Company vs. Escoe, 275 U. S. 498; 72 L. Ed. 393.

United States vs. Seminole Nation, 299 U. S. 417, 421; 81 L. Ed. 316.

2. This suit arises under Federal Statute Section 603, Revenue Act of 1932, requiring interpretation and construction of that statute to determine petitioner's rights and liabilities thereunder and therefore a federal question is presented.

McCain vs. Des Moines, 174 U. S. 168, 181; 43 L. Ed. 936.

Downs vs. Bidwell, 182 U. S. 244, 248; 45 L. Ed. 1088.

Gully vs. Bank, 299 U. S. 109, 112-114; 81 L. Ed. 70.

3. The District Court had jurisdiction under the Judicial Code, Section 24, amended, Subdivision (5), Fifth, Title 28, U. S. C. A. 41, (5), Fifth, the provision being that "The District Courts shall have original jurisdiction as follows: * * * (5), Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeal (Court of Customs and Patent Appeals)." 45 Stat. 1475. This statute confers jurisdiction upon the District Court in such cases regardless of the amount involved.

Downs vs. Bidwell, 182 U. S. 244, 248; 45 L. Ed. 1088.

4. The Circuit Court of Appeals had jurisdiction to review on appeal the final judgment and decree (R. 36) of the District Court under Section 128 of the Judicial Code as amended by the Act of February 13, 1925, 43

Stat. 936, the applicable provisions thereof being as follows:

> "Sec. 128(a). The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 238."

5. (a) This court has jurisdiction to review on *certiorari* the final decree (R. 45-46) of the Circuit Court of Appeals under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, the provisions of which are as follows:

> "Sec. 240(a). In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by *certiorari*, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

(b) The United States statute, the interpretation and construction of which is involved, is Section 603 of the United States Internal Revenue Act of 1932, 47 Stat. 169, quoted in verbatim in the summary 1 (a) of this petition.

(c) The decree order (R. 45-46) of the Circuit Court of Appeals to be reviewed became final June 5, 1941, when petitioner's petition for rehearing (R. 47),

filed June 2, 1941, was denied and entered June 5, 1941 (R. 53).

Hull vs. Burr, 234 U. S. 712, 721, 722; 58 L. Ed. 1557.

C

QUESTIONS PRESENTED

(a) The questions presented arise on petitioner's complaint and its exhibits (R. 1-14) with supplement thereto (R. 29), petitioner's affidavit and its Exhibit E (R. 15-18) submitted on the hearing for preliminary injunction and made part of the record and being really another supplement to the complaint, defendant's motion to dissolve the preliminary injunction and his amended motion to dismiss the complaint, both filed December 6, 1937 (R. 26-27), on alleged grounds that Section 3224, Revised Statutes (Section 1543, Title 26, U. S. C. A.), prohibits a suit to restrain assessment or collection of a federal tax; that the complaint sets out no facts entitling plaintiff to the relief prayed for in a court of equity or to injunctive relief pending the cause; that petitioner has adequate and complete remedy at law; and that the complaint does not set forth facts sufficient to constitute a cause of action in equity.

The District Court dissolved the injunction and dismissed the complaint (R. 36) and the Circuit Court of Appeals affirmed the District Court (R. 45) and denied petition for rehearing (R. 47-53).

(b) The questions presented are as follows:

1. Whether there were present exceptional and extraordinary circumstances shown by the record to

attend the case entitling the plaintiff notwithstanding said Section 3224, Revised Statutes, to institute and prosecute to conclusion this suit for order of refund to him of the amount of the tax paid under protest in the sum of $998.22, and for an injunctive decree forbidding collection of the tax, penalty and interest assessed against him but not paid in the sum of $6810.27.

2. The Internal Revenue Commissioner holding that NU-WITE, Tri-Sodium-Phosphate, not perfumed, whether sold in bulk or in packages, is not taxable under Section 603 (R. 3, paragraph 7, R. 15-18, affidavit and its Exhibit E, questions 2, 4, 5), does the addition by petitioner of a minute quantity of perfume oil to the packaged article for sales appeal only and imparting no odor to the user or anything washed with the softened water, and which does not in any instance change the character of the Tri-Sodium-Phosphate or enhance the cleansing or water softening qualities thereof, convert the packaged Tri-Sodium-Phosphate so perfumed into one of the articles specifically named in Section 603, or into any article, substance or preparation similar to any of such specificially named articles, and thus make such packaged article taxable under the section?

3. Whether by adding perfume oil in the manner, to the extent and only for the single purpose of sales appeal, namely, an odor attraction only, petitioner became a manufacturer, producer or importer.

4. Whether, under the peculiar circumstances of this case, although on motion to dismiss the complaint its allegations must be taken as true, the motion should not have been overruled and answer required so a trial on the merits could have been had on such pleadings, and on evidence.

D

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner seeks a writ of *certiorari* from this court because it is believed there are special and important reasons therefor:

1. The decision below involved a principle of far reaching importance to the public concerning the collection of internal revenue excise taxes, and if that decision shall be allowed to stand then any article not named in such a statute as the one involved here may be made taxable by the Commissioner's own edict, without authority of law simply because the article in question in the case has been given, for sales appeal only, some form of attraction pleasing to the sense of sight or of smell, although the attraction does not in any sense change the form, the properties, quality, utility or function of the article sought to be taxed.

2. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

3. The Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court and in conflict with decisions of other Circuit Courts of Appeals.

4. The Circuit Court of Appeals has decided an important question of general law in a way untenable and in conflict with the weight of authority.

5. The Circuit Court of Appeals in its order and decision (R. 45-46) erred in affirming the decree (R. 36) of the District Court, thereby deciding all the questions presented as shown above in C against petitioner.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8571, *James W. Murphy, Doing Business as LaFrance Toledo Company, Appellant, vs. James A. Brady, Acting Collector of Internal Revenue for the Tenth Ohio Collection District, Appellee*, and that said decree of said Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WM. O. BALLARD,

U. G. DENMAN,

Counsel for Petitioner.

BRIEF IN SUPPORT OF THE PETITION

I

THIS COURT'S RULES 27 AND 28

(a) Complying with Section 2(a) of this court's Rule 27, a subject index, with table of cases, text books and statute, cited both in this brief and the petition, precedes the petition.

(b) Complying with Section 2(b) of this court's Rule 27, reference to reports of the decrees, with dates thereof of the courts below (no opinions filed) appears in the first paragraph of the petition and given there also are references to the petition for rehearing in the Circuit Court of Appeals, with date of filing and order of that court denying the rehearing, with date thereof.

(c) Complying with Section 2(c) of this court's Rule 27 and of requirement in Rule 38 for statement of grounds and basis upon which it is claimed this court has jurisdiction to review the decree in question, such statement is given in Division B of the petition, STATEMENT DISCLOSING JURISDICTION.

(d) Complying with Section 2(d) of this court's Rule 27 and of requirement in Rule 38 for summary and statement of the matter involved, such statements are given in Division A of the petition, SUMMARY AND STATEMENT OF THE MATTER INVOLVED.

(e) Compliance with requirements of Section 2(e) of this court's Rule 27 is given in Division C, QUESTIONS PRESENTED, and Division D, REASONS FOR ALLOWANCE OF THE WRIT, of the petition.

II

ARGUMENT

We proceed to argument on the questions presented and on the stated reasons for allowance of the writ.

A

QUESTIONS PRESENTED

Question 1. Whether there were present exceptional and extraordinary circumstances shown by the record to attend the case entitling the plaintiff notwithstanding said Section 3224, Revised Statutes, to institute and prosecute to conclusion this suit for order of refund to him of the amount of the tax paid under protest in the sum of $998.22, and for an injunctive decree forbidding collection of the tax, penalty and interest assessed against him but not paid in the sum of $6810.27.

Summary of Facts: Petitioner contends that such circumstances are shown in the record and we summarize the facts on the question as follows: For approximately four years prior to this suit petitioner had been engaged in his business in Toledo, Ohio, purchasing in bulk, large lots, a white crystalline, caustic chemical water softener, Tri-Sodium-Phosphate (R. 1-3), purchased from the manufacturer thereof, Mansanto Chemical Company, of St. Louis, Missouri (R. 1-3, Exhibit B, R. 10), which chemical petitioner throughout said time in turn sold at retail to the public in packages, cartons, put up by him containing said chemical (R. 3, carton, R. 9), and in bulk (R. 3, paragraph 6), said chemical being sold at all times

whether in packages or in bulk under petitioner's registered trade name, NU-WITE;

That to the chemical in a portion of said packages petitioner added a minute quantity of perfume for sales appeal only, which in no instance changed the character of the chemical in any respect or enhanced at all its water softening qualities;

That throughout said time petitioner firmly believed and still believes that from the wording of said statute, Section 603 quoted above, NU-WITE, perfumed or unperfumed, was not subject to any tax under the section;

That he had no notice from respondent or the Commissioner of Internal Revenue that they claimed or would claim perfumed NU-WITE to be taxable under said section until the month of February, 1937 (R. 3, 4), when respondent notified petitioner that his packaged perfumed NU-WITE was so taxable and demanded that petitioner make monthly reports and pay tax under the section on all packaged perfumed NU-WITE theretofore sold by petitioner, and respondent thereafter assessed petitioner on such sales the sum of $4,924.27 tax, plus $1,231.07 penalty, plus $654.93 interest, or a total of $6,810.27 (R. 4);

That neither respondent nor the Internal Revenue Commissioner had been or was attempting to assess such tax on perfumed Tri-Sodium-Phosphate packaged and perfumed in the same manner and extent as above stated and sold to the public by petitioner's competitors (R. 4, paragraph 12);

That the business of packaging and selling Tri-Sodium-Phosphate in the manner mentioned above is a highly competitive business; that petitioner could not

pay said tax and compete with his competitors who were not required to pay and did not pay such tax (R. 5, paragraph 14);

That after said notice by respondent to petitioner that his perfumed NU-WITE was taxable and said demand was made, petitioner in the months of April, May, June and July, 1937, paid said tax under protest on the perfumed NU-WITE he had sold in the period from January 1, 1937, to June 30 of that year, in the sum of $998.22 (R. 4-6, paragraphs 9 and 15);

That NU-WITE is not any article, substance or preparation named in said section, nor is it similar to any article, substance or preparation named therein;

That NU-WITE is so caustic as to be not only unfit as a cosmetic, toilet powder, or similar article, but is actually harmful in contact with the human skin (R. 4, paragraph 11);

That Section 626 of the Revenue Act of 1932 requires every person liable for a tax under the Act to make monthly returns under oath and at the time of each report to pay the tax indicated thereby without assessment or notice thereof;

That failure to make said report and to pay said tax as aforesaid subjects all the property of the taxpayer to lien, distraint and sale to pay the tax, penalty and interest, and upon such failure respondent and the Internal Revenue Commissioner will resort to distraint and sale of petitioner's property to pay the tax (R. 5);

That the amount of the tax, penalty and interest so demanded by respondent as aforesaid in the sum of $6,810.27 was so large that petitioner could not pay the same; that to pay it would require petitioner to liquidate

and sacrifice the assets of his business, destroy his business and the good-will incident thereto, ruin him financially, and inflict upon him a permanent and irreparable injury, for which he has no adequate remedy at law; additionally, loss of petitioner's business would throw many persons out of work who are now self-supporting through employment by petitioner (R. 5), and his failure to make such reports and pay the tax, if valid, would subject petitioner to heavy civil and criminal penalties;

That on August 9, 1937, in answer to petitioner's inquiry and brief through his counsel he was advised by the Internal Revenue Commissioner that NU-WITE, not perfumed, either in bulk or in package, was not subject to the tax under Section 603 (R. 3, paragraph 7, and R. 17-18, Questions and Answers 2, 4, 5), but that NU-WITE perfumed as aforesaid, or NU-WITE, unperfumed but contained in a perfumed carton was taxable (R. 3, paragraph 7, affidavit R. 15-16, and Exhibit E, R. 17-18, Questions and Answers 3 and 6);

That on October 5, 1937, petitioner filed demand with respondent for refund of the tax, $998.22, he had paid under protest as aforesaid (R. 6, Exhibit C, R. 11);

That on October 21, 1937, petitioner received notice and demand for said tax not paid, Form 17, United States Treasury Department, Internal Revenue Service, in the sum of $6,810.27 (R. 6);

That on October 23, 1937, petitioner filed with respondent claim for abatement of said tax assessed but not paid including said penalty and interest in the sum of $6,810.27 (R. 6, Exhibit D, R. 13);

That on December 1, after filing of the complaint on November 8, 1937, petitioner received in writing from

the Commissioner of Internal Revenue an order holding that petitioner's perfumed NU-WITE water softener, or NU-WITE water softener sold in a perfumed container, is a preparation sales of which are subject to tax under Section 603, and that said claim for refund of said paid tax $998.22, was rejected in full (Supplement to Complaint, R. 29);

That on December 1, after filing of the complaint on November 8, 1937, petitioner received from the Commissioner of Internal Revenue an order in writing holding that petitioner's perfumed NU-WITE water softener, or NU-WITE water softener sold in perfumed container, is a preparation sales of which are subject to tax under Section 603, and that plaintiff's claim for abatement of the unpaid tax in the sum of $6,810.27 was rejected in full (Supplement to Complaint, R. 29-30);

AUTHORITIES ON QUESTION 1

On respondent's amended motion (R. 26) to dismiss the original complaint (R. 1) with its supplement (R. 29), the allegations of the complaint and its supplement must be taken as true.

Hill vs. Wallace, 259 U. S. 44, 61; 66 L. Ed. 816.

The wording of the statute, Section 603, as framed cannot be held to have given adequate notice to petitioner that the article sold by him, perfumed NU-WITE, was taxable, and while petitioner at all times has believed and has been satisfied both in his mind and on advice of counsel that the article is not taxable under the section, yet if there is a reasonable doubt as to the

meaning of the section it must be construed most favorably to the petitioner.

Miller, Collector, vs. Standard Nut Margarine Company, 284 U. S. 498, 508; 76 L. Ed. 422.

White vs. Aronson, 302 U. S. 20, 21; 82 L. Ed. 20.

This case, *White vs. Aronson*, involved interpretation and construction of Section 609, Revenue Act of 1932, imposing an excise tax on sporting goods and the language of it with respect to the articles named in the section is quite the same as the language in Section 603.

On the question under immediate discussion, whether special and extraordinary circumstances attend the case making Section 3224, Revised Statutes, inapplicable, the instant case is parallel in essential particulars with and must be ruled in favor of petitioner under

Miller, Collector, vs. Standard Nut Margarine Company, 284 U. S. 498, 502, 505, 506-511; 76 L. Ed. 422.

In the instant case petitioner had no notice from the statute, Section 603, that NU-WITE was taxable and he had no notice from the Internal Revenue Collector or Commissioner until the month of February, 1937, after he had been in business selling the article in question approximately four years. Prior to and at that time the respondent was not demanding any tax from petitioner's competitors who sold Tri-Sodium-Phosphate, perfumed and packaged in identically the same manner and to the same extent as was done by petitioner, but at that time the respondent notified petitioner that perfumed NU-

WITE was taxable under Section 603 and demanded that he make monthly reports and pay the tax upon all perfumed NU-WITE he had sold since the effective date of the Revenue Act of 1932; and this without making any such demand on petitioner's competitors selling the same article and without assessing or collecting any tax from such competitors.

When the demand was made on petitioner and the assessment entered against him shortly thereafter, the tax was in such large amount as that petitioner could not pay it. For him to have paid it would have taken all of his property, wrecked his business with the good-will attendant thereon, ruined him financially, and put out of employment many persons who were earning a living in his employ. He had no adequate remedy at law because he could not pay the tax. Not being able to pay the tax, nevertheless, under the ruling of the Internal Revenue Commissioner all of petitioner's property was subject to lien and to distraint and to sacrifice to raise the money to pay the tax, and in addition to all that he was liable under the Internal Revenue Statutes to severe civil penalties in the way of exacted interest and money penalties and liable to severe criminal penalties, criminal penalties as high as $10,000.00, along with imprisonment.

Sections 626b and 627, Revenue Act of 1932,
Sections 3176 and 3184, Revised Statutes,
and
Section 1114 of the Revenue Act of 1926.

Also, petitioner was arbitrarily discriminated against in that he was required to pay the tax while his competitors were not required so to do.

In the *Miller* case attempt was made by the revenue officers to lay and collect a tax under the statute in question there against an article which was not covered by the statute. The *Miller* case was not one in which injunction was sought upon the ground of mere illegality because of error in the amount of the tax. It was a case in which the article sought to be taxed was not covered by the Act. This court said a valid tax could not be laid on the article in question. So in the instant case NUWITE is not one of the articles named in Section 603, nor is it any substance, article or preparation similar to any of the articles specifically named therein.

In the opinion of the *Miller* case this court explains the reasons for the application of the rule, common law and statutory, prohibiting the restraining of the assessment or collection of the tax, page 509, and says:

> "The principal reason is that as courts are without authority to apportion or equalize taxes or to make assessments, such suits would enable those liable for taxes *in some amount* to delay payment or possibly to escape their lawful burdens" * * *.

It is there stated, however:

> "This court likewise recognizes the rule in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax, there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector."

This court finally, on the facts shown in the *Miller* case, to which we claim the facts of the instant case are parallel as aforesaid, sustained the courts below in enjoining the tax attempted in the case.

The opinion in the *Miller* case summarizes the reasons for the holding on page 510 of the report.

In addition to the above a further reason exists in the instant case for the issuance of an injunctive decree because of the fact that under the law in question, Revenue Act of 1932, petitioner would be bound to make monthly reports under oath showing the sales and at that time paying the tax indicated by the report without assessment or notice from the Collector or the Internal Revenue Commissioner. If petitioner were able, which he was not and is not, to pay the tax and maintain his business, but desired to test the question as to whether he was liable to the tax, it would be necessary for him to pay tax to the Collector each month and then sue to recover the same, which would lead to a multiplicity of suits because many months might and probably would expire before the question could be settled. For this reason also the present suit is maintainable.

Hill vs. Wallace, 259 U. S. 44, 62; 66 L. Ed. 422.

As stated above the allegations of the complaint and of its supplement on respondent's amended motion to dismiss must be taken as true.

In the *Miller* case, *supra*, page 510, this court held that special and extraordinary circumstances were present and involved in the case when the article sought to be taxed was not covered by the taxing Act; that the assessed tax was more than the taxpayer could pay; that taxing the petitioner on his article while not taxing his competitors on identical articles was arbitrary and discriminating and that such discrimination conflicts with

the principle underlying the constitutional provision directing that excises laid by Congress shall be uniform throughout the United States; that to pay it would wreck the business, ruin it financially, and inflict a loss for which it would have no remedy at law, and that under such circumstances Section 3224 of the Revised Statutes does not apply.

These facts are parallel with the facts of the instant case and the case definitely shows that the facts and circumstances of the instant case come within an acknowledged head of equity jurisprudence and that the suit should be entertained and maintained to enjoin the Collector.

If the taxpayer under circumstances such as are present here, who has been assessed in a substantial amount on an article not covered by the taxing Act, Section 603, in question, and cannot pay the tax, then how is he to have remedy except in a court of equity? If he cannot pay the tax and therefore cannot bring suit at law to recover it back and is not permitted to avail himself of remedy in equity, then the ancient maxim considered supreme comfort, hope and defense of and to every citizen, rich or poor, that "there is no wrong without a remedy," is abandoned.

To obviate a multiplicity of suits is a recognized head of equity jurisprudence, but it cannot be said to have greater merit or to be entitled to greater consideration in a case like the instant one than the right which should be guaranteed to petitioner to resort to equity to prevent his financial ruin.

The Court of Appeals in the instant case certainly

and grievously erred in affirming the decree of the District Court.

The opinion in the *Miller* case cites, we believe, practically all of the cases dealing with the question as to special and extraordinary circumstances up to the time of the decision of that case, and since then the principles announced there have been approved, affirmed and followed in the case of

> Allen, Collector, vs. Regents of University System of Georgia, 304 U. S. 439, 447-449; 82 L. Ed. 1448.

There are other special and extraordinary circumstances present and important in the instant case than the ones already discussed.

On August 9, 1937, the Commissioner of Internal Revenue in answer to an ~~injuiry~~ and brief for the petitioner by his counsel, sent to petitioner a letter ruling, a copy of which is Exhibit E in the record (R. 17, 18) in which the Commissioner definitely ruled in Question and Answer 2 that if the perfume were eliminated entirely from the product and the present containers, cartons (Exhibit A, R. 9) retained, NU-WITE would not be within the terms of the Act, Section 603.

He also ruled in Question and Answer 3 that if the perfume were retained and the outlined reading matter on the carton be eliminated, the product would then be within the terms of the Act.

He also ruled in Question and Answer 4 that if both the perfume and the outlined reading matter on the carton were eliminated, the product would not be within the terms of the Act.

He also ruled in Question and Answer 5 that if the proportion of NU-WITE sold to hospitals and industrial concerns for industrial purposes, that is, sold in bulk, were not perfumed, then such proportion would not be taxable.

He also held in Question and Answer 6 that if the carton only were perfumed, then the product within the carton would be subject to the tax.

These holdings plainly show that the Commissioner ruled that the mere addition of a minute quantity of perfume, either to NU-WITE itself or to the carton in which it is contained, regardless of the reading matter on the carton, makes the article subject to the tax, and this notwithstanding the fact that the carton says "NU-WITE will soften water for the bath." Certainly it would not be necessary for petitioner definitely to announce that the efficient water softener in question would soften water for any particular purpose or in any particular place. It must be considered as common knowledge that an article which will soften water will soften it anywhere, in any receptacle, wash tub, mop bucket, window washing pail, dish pan, or bath tub.

The Internal Revenue Commissioner also passed on the merits of the controversy in two other instances after the complaint was filed on November 8, 1937, in answer to demands for refund of taxes paid and abatement of taxes assessed but not paid, made prior to the filing of the complaint (R. 6-8, paragraphs 16, 17-18, and R. 29-30, Supplement to Complaint). In the supplement it is shown that in answer to the demands by petitioner for refund of the taxes paid and abatement of the taxes assessed but not paid, the Commissioner on December 1,

1937, ruled by his order holding that perfumed NU-WITE water softener or NU-WITE water softener sold in perfumed containers, are preparations subject to the tax under Section 603, and the claim for refund was rejected in full;

That on December 1, 1937, the Commissioner ruled by his order that perfumed NU-WITE water softener or NU-WITE water softener sold in perfumed containers, are preparations subject to the tax under Section 603, and petitioner's demand for abatement of the tax assessed but not paid was rejected in full.

It must of course be assumed that the Commissioner gave the questions and demands referred to above full consideration on the merits, and if petitioner had paid the tax and instituted suit for its recovery, the contention of the Commissioner would remain the same as indicated by his answers to the questions in his letter of August 9, 1937, and in his order holdings on the demand for refund and abatement. These facts show and constitute exceptional and extraordinary circumstances because a suit to recover the taxes paid would have been a useless and burdensome imposition on petitioner so far as the Commissioner was concerned.

Dodge vs. Brady, Collector, 240 U. S. 122, 125-126; 60 L. Ed. 560.

Under the circumstances of the instant case, after the demand made on October 21, 1937 (R. 6, paragraph 17), for the tax not paid, there was nothing petitioner could do to protect his claimed rights in the matter but to appeal to a court of equity as he did on November 8, 1937, and this because he was not able to pay the tax

without losing his business and the good-will thereof built up over a period of four years, and ruining himself financially.

In his argument in the Court of Appeals in this case counsel for the government called to the attention of the court the fact, as he stated, that the amount of tax in question in the *Miller* case was a very large amount, although the amount is not given in the report of that case, and called attention to the fact that the tax in question in the instant case was of but a small amount, only $6810.27, thus indicating that he meant to convey to the court his notion that the smaller amount of tax involved in the instant case obviated the question, or at least one of the elements of the question, as to whether there were special and extraordinary circumstances attending this case as claimed by petitioner. This attitude is not in keeping with the system of government under which we live and its concern for the welfare of every citizen.

"EXCEPTIONAL CIRCUMSTANCES" DEFINED

Congress has not attempted to define the terms "exceptional and extraordinary circumstances" either by way of exception to the wording of Section 3224, Revised Statutes or by separate enactment.

In each of the cases above cited, except the case of *Dodge vs. Brady, supra,* several concrete circumstances were involved, but in no case did the court indicate that the existence of only one circumstance would be insufficient in any case to render inapplicable the prohibitive statute, Section 3224, Revised Statutes. In the case of *Dodge vs. Brady, supra,* the determining fact giving rise

to exceptional and extraordinary circumstances was the fact that the Commissioner of Internal Revenue on protest to him against the tax in question did assume authority over the case and ruled upon the matter adversely to the taxpayer, "thereby passing upon every question which he would be called upon to decide on an appeal for a refunding of the taxes paid."

In the case of *Miller vs. Standard Nut Margarine Company, supra,* it is stated in the opinion, page 509, that when it can be shown that the circumstances come under some acknowledged head of equity jurisprudence the circumstances involved will be considered as special and extraordinary circumstances rendering inapplicable Section 3224, and a suit may be maintained to enjoin the Collector from collecting an illegal tax.

This court long before the decision of the *Miller* case defined exceptional and extraordinary circumstances as involved in cases like the instant one in the case of

Dows vs. City of Chicago et al., 78 U. S. 108, 111-112; 20 L. Ed. 65.

In the opinion of the above case by Mr. Justice Field the rules are stated as follows:

> "No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked.

"Numerous cases are found in the reports where jurisdiction has been taken under similar circumstances and the collection of an illegal tax restrained, but our attention has not been called to any well considered case where a court of equity has interfered by injunction after its jurisdiction was questioned, except upon some one of the special circumstances mentioned.

"The decision of the Court of Appeals of New York in *Heywood vs. Buffalo*, 14 N. Y. 534, is in conformity with the views here expressed. In that case the court held the general rule to be that a court of equity will not entertain an action by the party aggrieved for relief against an erroneous or illegal assessment, but said that this rule was subject to three exceptions, substantially these: where the enforcement of the assessment would lead to a multiplicity of suits, or where it would produce irreparable injury, or where the assessment on the face of the proceedings was valid, and extrinsic evidence would be required to show its invalidity. Whenever a case was made by the pleadings falling within either of these exceptions, the court said that equity would interfere to arrest the excessive litigation, or prevent the irreparable injury, or remove the cloud upon the title, but would not interfere where none of these circumstances existed. In *Susquehanna Bk. vs. Broome Co.*, 25 N. Y. 312, the same doctrine was substantially repeated, the court declaring that a bill to restrain the collection of a tax would not lie unless the case was brought within some acknowledged head of equity jurisdiction."

From the above holding of this court it will be seen that the existence of any one of the special circumstances mentioned in the opinion makes inapplicable the provisions of Section 3224 of the Revised Statutes and a suit to enjoin the Collector may be maintained.

In the *Miller* case at page 510 it is held by this court that to pay the tax in question would have wrecked the business, ruined the taxpayer financially, and thereby inflict a loss upon the taxpayer for which he would have no remedy at law, that is to say, there would have been inflicted upon the taxpayer irreparable injury, which situation is clearly present in the instant case. We have heretofore shown that to enforce the collection would result in a multiplicity of suits and since the allegations of the complaint on respondent's motion to dismiss must be taken as true, the tax is illegal, the article is not subject to the tax because as shown by the allegations of the complaint it is not any one of the articles specifically named in Section 603, and it is not any article, substance or preparation similar to any of the articles named in said Section 603.

According to the decision in the *Dows* case, *supra*, it is only necessary that any one of the special circumstances named there be present to entitle the taxpayer to an injunction, namely, multiplicity of suits and irreparable injury, or a case of where the assessment on the face of the proceedings was valid and extrinsic evidence would be required to show its invalidity.

In the instant case we conclude therefore that the circumstances thereof are special and extraordinary under the facts and holdings of the cases cited above and that the decision of the Circuit Court of Appeals is contrary to and in conflict with the decisions of this court in those cases, and therefore the Court of Appeals erred in affirming the decree of the District Court.

INFORMATION SINCE DECISION IN DISTRICT COURT

With respect to non-exaction and non-payment of taxes by petitioner's many competitors, the statements of the petition given above and in the argument thus far are in accordance with the allegations of the complaint in paragraph 12 (R. 4) and in accordance in every respect with the information, not in writing, within the knowledge of petitioner and his counsel at the time of the institution of the suit and until after the case was decided in the District Court.

We think it our duty, in good faith, to advise this court the same as counsel for petitioner advised the Court of Appeals on the argument there, that some time after the case had been decided in the District Court counsel for petitioner was permitted to see a ruling in writing from the Internal Revenue Commissioner under date of September 7, 1937, to one of petitioner's competitors, that the article said competitor was selling, Tri-Sodium-Phosphate water softener in packages, which packages alone were perfumed, was not taxable; and further, counsel was permitted to see a subsequent letter order in writing from the Internal Revenue Commissioner dated October 25, 1937, through which the Internal Revenue Commissioner reversed the former ruling to said competitor and held that Tri-Sodium-Phosphate water softener, unperfumed but sold in a perfumed carton, was subject to said Section 603 and taxable.

As indicated above, we feel it our duty to give this information to this court because it does concern the atti-

tude of the Department of Internal Revenue toward the construction of said Section 603.

The permission to see the rulings in writing mentioned above was given to counsel for petitioner by petitioner's competitor to whom the rulings were given.

Question 2. The Internal Revenue Commissioner holding that NU-WITE, Tri-Sodium-Phosphate, not perfumed, whether sold in bulk or in packages, is not taxable under Section 603 (R. 3, paragraph 7, R. 15-18, affidavit and its Exhibit E, questions 2, 4, 5), does the addition by petitioner of a minute quantity of perfume oil to the packaged article for sales appeal only and imparting no odor to the user or anything washed with the softened water, and which does not in any instance change the character of the Tri-Sodium-Phosphate or enhance the cleansing or water softening qualities thereof, convert the packaged Tri-Sodium-Phosphate so perfumed into one of the articles specifically named in Section 603, or into any article, substance or preparation similar to any of such specifically named articles, and thus make such packaged article taxable under the section?

Reason for Writ, 1. The decision below involved a principle of far reaching importance to the public concerning the collection of internal revenue excise taxes, and if that decision shall be allowed to stand then any article not named in such a statute as the one involved here may be made taxable by the Commissioner's own edict, without authority of law simply because the article in question in the case has been given, for sales appeal only, some form of attraction pleasing to the sense of sight or of smell, although the attraction does not in any

sense change the form, the properties, quality, utility or function of the article sought to be taxed.

Reason for Writ, 2. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

AUTHORITIES ON QUESTION 2 AND REASONS FOR WRIT 1 AND 2

The petitioner purchases the product he sells, Tri-Sodium-Phosphate, from the manufacturer thereof in St. Louis, Missouri, and petitioner resells that product in bulk unperfumed, and in cartons in some of which the product is minutely perfumed and in some of which the product is not perfumed, but in each case it is sold under petitioner's trade name of NU-WITE. The perfume is added only as a sales appeal and in such minute quantity that it imparts no odor to the user or anything washed with the softened water (R. 3, affidavit, R. 15-16), and so added the perfume does not change the form, the properties, the quality, utility or function of the product sought to be taxed. The perfume is added simply as a form of sales appeal, attraction to the purchaser, pleasing to the sense of smell. In any case the product, NU-WITE, is still only Tri-Sodium-Phosphate.

The product is used and so advertised as a general purpose water softener and cleanser for the heavier operations in such work, namely, in the home in softening water for cleaning of walls, sinks, floors, windows and in the many heavy operations for cleaning such as in garages, factories, laundries and all the other heavy uses mentioned in Exhibit B of the record (R. 10).

Respondent's only claim is that the perfumed product is taxable because it will soften water in the bath.

Of course, it will soften water in the bath or anywhere else in any receptacle, but the use of it in the bath is only incidental to the many heavy uses to which it is intended to be applied primarily as stated above.

The Internal Revenue Commissioner has ruled that "If the perfume be eliminated entirely from the product and the present containers, cartons, retained the product would not then be considered within the terms of said Section 603" (Exhibit E, R. 17-18). This of course eliminates the reading matter on petitioner's carton which does refer to the bath (Exhibit A, R. 9).

In his Article 22, Regulation 46, the Internal Revenue Commissioner says, "the tax will not attach to any article or substance which has only an incidental or occasional use as a toilet preparation."

Regulations 46, Article 22.

Referring to the wording of Section 603, a number of articles are specifically named there as the articles to which the tax applies. The last two of these articles are toilet soaps and toilet powders and then come the general provisions: "and any similar substance, article or preparation." The complaint shows that Tri-Sodium-Phosphate is a crystalline caustic article not only unfit for use as a cosmetic, toilet powder or any similar article, but is actually harmful in contact with human skin (R. 4), and the court will take judicial notice of the ordinary, common acceptance of the meaning of the terms used in the section, especially of the terms "toilet soaps" and "toilet powders."

Brown vs. Piper, 91 U. S. 37, 43, 44; 23 L. Ed. 200.

It is a matter of common knowledge that toilet soap as understood by everybody is not caustic, and the same is true of toilet powder; each of them is intended to be applied and is applied with impunity to the human skin with comforting, soothing and healing effect. Certain it is that the perfumed product is not at all similar to any of the other articles specifically named in the section.

Under the well established rules of construction of statutes the words "similar substance, article or preparation" must be limited to the articles theretofore named in the section.

It is well settled that when an article is to be taxed it must clearly and unmistakably appear from the wording of the statute that Congress meant to include it, and if the question is at all doubtful the doubt will be declared against the tax. Also it is well settled that a mere casual use of an article not specifically identified does not and should not come within the terms of the statute because such use is only incidental to the real use for which the article is intended;

Sharp & Dohme vs. Ladner, 82 F. (2nd) 733, 734.

That it must be clear that the article comes within the specific names of articles listed we cite:

American LaFrance Engine Co. vs. Riordan, 6 F. (2nd) 964, 966-968.

White vs. Aronson, 302 U. S. 16, 20.

Monroe Cider Vinegar & Fruit Co. vs. Riordan, 280 Fed. 624.

In the *Riordan* case it was held that the term "sweet cider" was not included in the terms "and other soft drinks."

Sterling Cider Co. vs. Casey, 285 Fed. 885, 886.

This case was affirmed in the Court of Appeals.

Casey vs. Sterling Cider Co., 294 Fed. 426, 428.

It was held in the District Court in construing Section 628 of the Internal Revenue Act of 1918 that loganberry juice, being the expressed juice of loganberries, and that another article under the trade name of Phez, being that juice with sugar added, was not taxable because the mere addition of sugar did not make it a soft drink within that act, and it was also held that the further addition of water before sale did not make a soft drink and taxable because it could not be held to be another soft drink similarly manufactured or produced as was done in producing ginger ale, pop, root beer, and so forth.

Phez Co. vs. U. S. and N. Fruit Co., 25 F. (2nd) 1011, 1012.

This case was affirmed in

U. S. vs. Phez Co., 28 F. (2nd) 106.

The rule of construction in all such instances is the rule prescribed in

Eidman vs. Martinez, 184 U. S. 578, 583; 46 L. Ed. 697.

Clear and unambiguous language is required.

In righteous reasoning it simply can not be that the addition of the minute quantity of perfume of Tri-Sodium-Phosphate under the circumstances related in Question 2 and shown by the record can change that article into an article taxable under Section 603. After the addition it is still only Tri-Sodium-Phosphate added to only by an attraction for sales appeal. The decision below, as stated in Reasons 1 and 2 for the allowance of the writ, involved a principle of far reaching importance to the public concerning the collection of internal revenue excise taxes, and if that decision shall be allowed to stand then apparently there is no limit as to the extent to which the Internal Revenue Commissioner may go in making articles not specifically mentioned in the taxing act taxable, simply by holding that the article in question in the given case was added to for sales appeal only some form of attraction pleasing to the sense of sight or of smell, although the attraction does not in any sense change the form, the properties, quality, utility or function of the product sought to be taxed, and in that decision the Court of Appeals decided that important question of federal law which has not been, but should be, settled by this court.

U. S. vs. Rimer, 220 U. S. 547, 548; 55 L. Ed. 578.

The interpretation and construction of such statutes involves a question of general law and the decision of the Circuit Court of Appeals decided the question in the

instant case in a way untenable and in conflict with the weight of authority.

Question 3. Whether by adding perfume oil in the manner, to the extent and only for the single purpose of sales appeal, namely, an odor attraction only, petitioner became a manufacturer, producer or importer.

AUTHORITIES ON QUESTION 3

The addition by petitioner of the minute quantity of perfume as shown above and by the record does not give petitioner the status of a manufacturer. The product after the perfume is added is still only Tri-Sodium-Phosphate which the Internal Revenue Commissioner rules is not taxable if it is not perfumed, whether sold in cartons or in bulk.

(R. 3, Par. 7, Exhibit E, R. 17-18.)

That petitioner is not a manufacturer we cite:

Hartranft vs. Wiegmann, 121 U. S. 609, 615; 30 L. Ed. 1012; American Fruit Growers vs. Brogdex, 283 U. S. 1, 11-13.

City of Memphis vs. St. Louis SFR Co., 183 Fed. 529, 538, 539.

Thurman, Collector, vs. Swisshelm, 36 F. (2nd) 350.

Gudewell & Bucknall vs. U. S., 142 Fed. 214.

Question 4. Whether under the peculiar circumstances of this case, although on motion to dismiss the

complaint its allegations must be taken as true, the motion should not have been overruled and answer required so a trial on the merits could have been had on such pleadings and on evidence.

We think that the record as it stands supports all the claims for which we contend but the better rule for such cases is that Answer be required and the defense there set forth, so that evidence on a trial may show the real situation.

AUTHORITIES UNDER QUESTION 4

This case was instituted when the former equity rules were in force and Equity Rule 29 abolishing pleas and demurrers was applicable. To require Answer and trial upon the merits under evidence is much more likely to promote justice and it is entirely within the discretion of the court to require such procedure. It has been held that:

> "Indeed the rule goes to the extent that, unless the motion clearly discloses that on the allegations of the bill, which are taken as true, it must be dismissed upon final hearing, the preliminary motion to dismiss must be denied."
>
> O'Keefe vs. New Orleans, 273 Fed. 560, 561, 567.

The above case was affirmed in

New Orleans vs. O'Keefe, 280 Fed. 92;
Wright vs. Barnard, 233 Fed. 329.

In a trial on the merits in the instant case the evidence would clearly sustain every contention made here-

in by petitioner. It would show the ingredients of each of the articles specifically named in the Section 603 and it would show that the chemical Tri-Sodium-Phosphate is not in any of them. It would plainly show that toilet soaps and toilet powders in the common and ordinary acceptance of the terms are not caustic; that they may be plentifully applied to the human skin with only comforting, soothing and healing effect. No toilet powder is crystalline; if it were then it would not be a powder and nobody would use it as a toilet powder.

Mr. Hopkins in the seventh edition of Equity Rules, Annotated, page 197, says:

> "Therefore, unless the motion discloses clearly that upon the allegations of the bill it must be dismissed upon final hearing, the motion to dismiss must be denied."
>
> Ralston Steel Car Co. vs. National Dump Car Co., 223 Fed. 590;
>
> Geiger vs. First-Troy National Bank & T. Co., 30 F. (2nd) 7.
>
> Where a motion to dismiss raises a question in which the court may be aided by evidence, on final hearing the court may deny the motion and grant leave to raise that question by Answer.
>
> Loughran vs. Quaker City Chocolate & C. Co., 281 Fed. 186-187."

B.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that questions of special importance to the public may be settled and to such an end a writ of *certiorari* should be granted, and this court should review the decision of the United States Court of Appeals for the Sixth Circuit and finally reverse it.

WM. O. BALLARD,

U. G. DENMAN,

Counsel for Petitioner.

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414384—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 573

JAMES W. MURPHY, DOING BUSINESS AS LAFRANCE TOLEDO COMPANY, PETITIONER

v.

JAMES A. BRADY, ACTING COLLECTOR OF INTERNAL REVENUE FOR OHIO (TENTH DISTRICT)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court or by the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 6, 1941 (R. 45–46). Petition for rehearing, filed on June 2, 1941 (R. 47–52), was denied by order entered on June 5, 1941 (R. 53).

The petition for a writ of certiorari was filed August 30, 1941. The jurisdiction of this Court is involved under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, despite the prohibition of Section 3224 of the Revised Statutes, the bill of complaint alleges facts sufficient to warrant a court of equity to enjoin the collection of a Federal tax.

STATUTES INVOLVED

The pertinent statutes will be found in the Appendix, *infra*, pp. 6–8.

STATEMENT

The bill of complaint (R. 1–18) alleges that the petitioner packs and distributes a perfumed water softener which is produced by adding a minute quantity of perfume to tri-sodium phosphate; that the Commissioner of Internal Revenue has held that this product is subject to tax under Section 603 of the Revenue Act of 1932 imposing a tax upon sales of toilet preparations by the manufacturer; that the petitioner has paid the sum of $998.22 as such taxes, for which, on October 5, 1937, he filed a claim for refund; that the Commissioner has assessed against the petitioner the further sum of $4,924.27 as taxes, together with $1,231.07 penalty and $654.93 interest, a total of $6,810.27; that petitioner's product is not taxable under Section 603

and petitioner is not a manufacturer within the terms of the statute. The bill prays for declaratory judgment that petitioner is not a manufacturer, producer, or importer within the meaning of the statute and that his product is not taxable thereunder; that the petitioner have judgment for the tax paid; and that the collection of the tax assessed but not collected be enjoined.

On November 16, 1937, after hearing, the District Court granted a preliminary injunction (R. 21–23). A motion to dissolve the injunction (R. 25–26) and an amended motion to dismiss the bill of complaint (R. 26–27) were filed by the respondent on December 6, 1937. These motions were based upon the ground that the court was without jurisdiction to enjoin the collection of a federal tax and that the bill failed to state facts sufficient to constitute a cause of action.

On March 20, 1939, after hearing, the District Court entered an order sustaining these motions (R. 31). The Circuit Court of Appeals affirmed.

ARGUMENT

1. Section 3224 of the Revised Statutes, now Section 3653, I. R. C. (Appendix, *infra*), prohibits the maintenance of any suit for the purpose of restraining the assessment or collection of a federal tax. *Graham* v. *Du Pont,* 262 U. S. 234; *Bailey* v. *George,* 259 U. S. 16; *Dodge* v. *Brady,* 240 U. S. 122; *Snyder* v. *Marks,* 109 U. S. 189; *Cheat-*

ham v. *United States*, 92 U. S. 85; *State Railroad Tax Cases*, 92 U. S. 575. Nevertheless injunctions have been permitted in several cases where exceptional and extraordinary circumstances were thought to exist. *Miller* v. *Nut Margarine Co.*, 284 U. S. 498; *Allen* v. *Regents*, 304 U. S. 439. Although the dissents in those cases indicate considerable doubt as to the results there reached in ignoring the plain command of Section 3224, those decisions nevertheless have no application here since petitioner has made no showing of exceptional and extraordinary circumstances. While the bill of complaint (R. 7) alleges that the collection of the tax will inflict immediate and irreparable injury to the petitioner, no facts are set forth to sustain that conclusion and to show that petitioner's remedy at law under Section 3226 of the Revised Statutes (Appendix, *infra*) is in any way inadequate. The District Court concluded that no such injury would result and that petitioner's remedy was adequate (R. 33).

2. The bill cannot be sustained as alleging a cause of action at law for the recovery of the tax paid. Section 3226 of the Revised Statutes prohibits the bringing of suit for the recovery of taxes before the expiration of six months after filing a claim for refund, unless the claim is acted on sooner by the Commissioner. The claim for refund (R. 6) was filed on October 5, 1937, and rejected on December 1, 1937 (R. 29–30); the instant suit was begun on November 8, 1937 (R. 1).

Moreover, the tax here sought to be recovered was collected by the respondent's predecessor in office and suit for its recovery does not lie against the respondent. *Levy* v. *Wardell*, 258 U. S. 542.

3. The District Court was without jurisdiction to grant declaratory judgment as prayed by the petitioner since jurisdiction of suits for declaratory judgment with respect to federal taxes is expressly withheld by Section 274D, Judicial Code (Appendix, *infra*).

CONCLUSION

The decision of the court below is correct, and there is no conflict with other decisions. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK,
Assistant Attorney General.
J. LOUIS MONARCH,
FREDERIC G. RITA,
Special Assistants to the Attorney General.

SEPTEMBER 1941.

APPENDIX

Judicial Code:

SEC. 274D [as added by the Act of June 14, 1934, c. 512, 48 Stat. 955, and amended by Sec. 405, Revenue Act of 1935, c. 829, 49 Stat. 1014; the amendatory matter is shown in italics]. (1) In cases of actual controversy (*except with respect to Federal taxes*) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such. * * * (U. S. C. Supp. V, Title 28, Sec. 400.)

Revenue Act of 1932, 47 Stat. 169:

SEC. 603. TAX ON TOILET PREPARATIONS, ETC.

There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold: Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings, hair restoratives, hair dyes, tooth and mouth washes (except that the rate shall be 5 per centum), dentifrices, (except that the rate shall be 5 per centum), tooth pastes (except that the rate shall be 5

per centum), aromatic cachous, toilet soaps (except that the rate shall be 5 per centum), toilet powders, and any similar substance, article, or preparation, by whatsoever name known or distinguished; any of the above which are used or applied or intended to be used or applied for toilet purposes.

Revised Statutes:

SEC. 3224. No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. (U. S. C., Title 26, Sec. 1543.)

* * * * * *

SEC. 3226 [as amended by Section 1103, Revenue Act of 1932]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision

thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

GOVERNMENT PRINTING OFFICE: 1941